No. 15,264

IN THE

United States Court of Appeals

For the Ninth Circuit

ORION SHIPPING AND TRADING COMPANY, INC., a corporation, and PACIFIC CARGO CARRIERS CORPORATION,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLEE.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
CHARLES P. MORIARTY,
United States Attorney,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistant to the Attorney General,
GRAYDON S. STARING,
Attorney, Department of Justice,
447A Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

Subject Index

Index to Appendices

Table of Authorities Cited

Statutes

Rules

Texts

No. 15,264

IN THE

United States Court of Appeals

For the Ninth Circuit

ORION SHIPPING AND TRADING COMPANY, INC., a corporation, and PACIFIC CARGO CARRIERS CORPORATION,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Western District of Washington, Northern Division.

BRIEF FOR APPELLEE.

JURISDICTION.

The District Court had no jurisdiction of this action, which was commenced by the filing of a third party complaint (R. 7) against the United States at law, since the claim arises out of the carriage of cargo owned by the United States upon a vessel operated as a merchant vessel by a corporation having its corporate residence in New York City and therefore lies exclusively within the admirality jurisdiction of the

cargo of scrap metal being loaded, and failing to prevent escape of the gas.

The United States moved (R. 12) to dismiss the third party complaint on grounds of lack of jurisdiction at law, improper venue and failure to allege facts showing proper venue, as well as other grounds. The Government's motion to dismiss, when first argued, was denied with leave to renew it at the time of trial (R. 21). After trial resulting in a judgment (R. 31) for plaintiff against Appellants here, the court below granted the Government's motion and dismissed the third party complaint as exclusively cognizable under the Suits in Admiralty Act (R. 34). Appellants subsequently moved for reconsideration (R. 35) and for transfer of the third party complaint to the Southern District of New York (R. 36) and both those motions were denied (R. 38). From the lower court's dismissal of the third party complaint and refusal to transfer it, Appellants are now appealing.

This case is one of seven cases at law filed by as many different plaintiffs against defendants-appellants. In each separate case, as here, a third party complaint against the United States was filed, in each case the third party complaint was dismissed, and in each case an appeal was taken. In order to shorten the record the parties have stipulated and the court has ordered (R. 99-102) that the cases be consolidated for appeal and that the result in the present case, No. 15,264, be the law of the case in each of the other consolidated cases. Certain matters from the record of another of the consolidated cases, No. 15,261, have

been included in the printed record and will be referred to.

Attorneys for Appellants correctly state in their brief (p. 7) that as early as June 15, 1955, the United States moved to dismiss the third party complaint in this case and, while they recite certain of the grounds of the motion (lack of jurisdiction, actual improper venue and failure to state a cause of action), they omit to state a ground which, under their argument of the case, is of considerable significance, that is, "That third party plaintiff has failed to allege facts showing that the venue is properly laid in the Western District of Washington" (R. 13). Counsel further state that the motion was denied (Brief 8) but neglect to point out that the denial was with explicit leave to renew the motion at the time of trial (R. 21). At the opening of trial the motion was renewed (R. 49) and the grounds of the motion were continually reserved (R. 49, 53-54, 57, 59, 67).

Actually, as early as December 6, 1954, in the companion case, No. 15,261, now consolidated with this case on appeal, Judge Lindberg granted the Government's motion and dismissed the third party complaint. (R. 6.) A motion to vacate the dismissal was subsequently granted, without opposition from the Government, in order that the case could be transferred to Judge Bowen before whom the other six law cases were then pending. (See docket entries, R. 42-43). Despite this early warning to Appellants and despite the fact that the issues of jurisdiction and venue were pointedly left open for later decision by

Judge Bowen, the Appellants did not file the appropriate libel in New York until July 26, 1956, when they filed the action, in which the amended libel, seeking indemnity for the judgment in this present action and the other actions consolidated with it on appeal here, is exhibited in Appendix B. It is an astonishing feature of this case that it is one of no less than 12 separate cases filed against the United States by appellants on only one cause of action[1] and that Appellants have accomplished this feat mainly by the improper use of third party procedure which was intended to reduce rather than multiply litigation.

SUMMARY OF ARGUMENT.

I. This case arises from the attempt of shipowners carrying Government cargo to sue the United States, in clear violation of the terms of consent to be sued in the Suits in Admiralty Act, by third party complaints at law in a number of separate suits by seamen for injuries arising out of the Government's loading of its cargo. Instead of filing in the proper district court the single suit in admiralty provided in the Suits in Admiralty Act for all the damage they might claim as the result of various seamen's actions against them in different courts, they have attempted to use third party complaints at law not only to circumvent the exclusive jurisdiction of the Suits in Admiralty Act but to violate the very purpose of third party proceedings by involving the Government

[1]See R. 99, Footnote 9 *infra* and Appendices B and F.

in a needless multiplicity of actions arising out of, at the most, one single cause of action.

The application of the Suits in Admiralty Act to appellants' claims is clear from the Act and is undisputed by the parties. The Supreme Court has always held that where the remedy of a suit in admiralty under the Act is available it is the exclusive remedy against the United States, and has likewise held that the remedy provided by the Suits in Admiralty Act may not be pursued in a suit at law, but only in admiralty, and according to its procedures and rules.

Under the express terms of the Federal Rules of Civil Procedure, Rule 14, providing for third party complaints, does not apply to admiralty suits and, moreover, may not be used to extend the jurisdiction of the court or change the venue of an action. Similarly, Admiralty Rule 56 has no application to a case brought at law and governed by the Federal Rules of Civil Procedure. There is not even the authority of a rule, therefore, for the use of a third party complaint in this case. More serious, however, since rules do not confer jurisdiction, are the many and repeated holdings of the courts, on jurisdictional grounds, that third party practice may not be used to mingle in one case admiralty claims and common law claims, where the court as then sitting would be without jurisdiction of one of the claims if it were brought in a separate suit. The doctrine of ancillary jurisdiction, seemingly relied upon by appellants, applies only to suits where it is made necessary by the court's custody of property or assets which are the subject of the

various claims. Since the present case involves no property or assets in the custody of the court, the doctrine of ancillary jurisdiction has, of course, no application here.

II. Not only did Appellants ignore the jurisdictional commands of the Suits in Admiralty Act, but they also ignored its requirement, as applied to this claim, that the suit be brought in the district of their corporate residence, which the record shows to be in New York. This venue requirement has at no time been waived by the Government and is one of the strict conditions of the permission to sue under the Act. Actually, Appellants' confusing contentions about the presence of the vessel at Seattle are completely irrelevant, since the action is not *in rem* or on *in rem* principles and since the vessel was Appellants' own and Appellants in their claim against the Government are therefore, of course, not charging any liability on the vessel.

III. Finally, Appellants' motion to transfer the third party proceedings to the Southern District of New York was properly denied for a number of reasons. First, the court could not transfer since it had no jurisdiction to do anything but dismiss. Second, the transfer of third party proceedings in any case would be improper, as contrary to the purpose of the procedure by using it to make two cases instead of one and to put the third party defendant through trial in both, and by raising insuperable problems concerning appeals from the different portions of the case. Third, the authorities in the district and circuit to

which transfer was asked show that transfer would not have been accepted there. Lastly, if the court below had had any discretion to transfer, denial would have been a proper exercise of that discretion since Appellants had stubbornly persisted in their vexatious course of multiple suits despite early and continued objections and with the knowledge that the jurisdiction of this action remained to be decided at trial.

ARGUMENT.

I.

THE DISTRICT COURT LACKED JURISDICTION OF THE THIRD PARTY COMPLAINT AT LAW AND PROPERLY DISMISSED IT.

A. Third party plaintiffs' claim is exclusively under the Suits in Admiralty Act.

Although it appears that Appellants now agree that the Suits in Admiralty Act applies to their claim, the Court is entitled to have this conclusion explained since, of course, jurisdictional matters are never settled by consent.

Where, as here, the vessel is a merchant vessel and the claim is based upon carriage of cargo owned or possessed by the United States, the claim is within the terms of the Suits in Admiralty Act. It has long been established by the Supreme Court that, as to such claims, "arising out of the operation of merchant vessels," the admiralty remedy under the Suits in Admiralty Act is exclusive of any other remedy. *Johnson v. Fleet Corporation,* 280 U. S. 320, 326, 1930 A. M. C. 1, 5. If a libelant entertains any doubt as

to the sufficiency of Suits in Admiralty Act jurisdiction, he can always protect himself by also invoking in his libel the jurisdictional grants of the Tucker and Tort Claims Acts, 28 U. S. C. 1346 (a) (2) and 1346 (b). These provisions are applicable to "any civil action," which is held to include proceedings in admiralty. See *Torres v. Walsh,* 221 F. 2d 319, 321, 1955 A.M.C. 1181, 1184 (2nd Cir.) collecting cases.

The third party complaint in this case (R. 7-12) alleges, in Paragraph IV, that the SS SEACORONET was operated as a merchant vessel carrying Government cargo, and in Paragraphs VI and VII, that the injuries of plaintiff Basnight arose out of acts of the United States in connection with the loading of such Government cargo aboard the SEACORONET. It is plain, therefore, from the third party complaint itself, that the cargo was owned or possessed by the United States, that the vessel was operated as a merchant vessel and that the claim arose from alleged breach of the Government's duty in its relationship to Appellants as cargo owner and shipper on their vessel.

The claim in this case is unquestionably embraced by the plain language of the Suits in Admiralty Act at 46 U. S. C. §742, which provides in pertinent part that:

> "In cases where . . . if such cargo [owned or possessed by the United States] were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in

personam may be brought against the United States . . ." (Material in brackets supplied from §741).

In the present case it is undisputed that the cargo was owned or possessed by the United States and that if it were privately owned and possessed, that is, if the United States were a private party, a proceeding in admiralty could be maintained at the time the present action was commenced. Appellants were therefore plainly entitled to file a libel *in personam,* as they have now in fact done (Appendix B) in the Southern District of New York, under the exclusive jurisdiction of the Suits in Admiralty Act.

B. Admiralty is the exclusive forum for an action under the Suits in Admiralty Act.

The Suits in Admiralty Act provides only for a libel *in personam* in admiralty against the United States (46 U. S. C. §742). The court below, sitting as a court of law, under the Federal Rules of Civil Procedure rather than the Admiralty Rules, had no jurisdiction of this action against the United States cognizable under the Suits in Admiralty Act and therefore had no course but to dismiss it. *Johnson v. Fleet Corporation,* 280 U. S. 320, 1930 A. M. C. 1. In the recent case of *Dell v. American Export Lines v. United States,* 142 F. Supp. 511, 1956 A. M. C. 1567 (S. D. N. Y.), an action of the precise character of the present one where the court also dismissed the third party complaint at law for lack of jurisdiction, the *Johnson* case is carefully reviewed and applied to

the improper attempt to proceed by third party complaint at law.

This Court, in a recent case, in construing the Death on the High Seas Act, 46 U. S. C. §§761 *et seq.,* has reaffirmed that when a statute, as in this case, grants jurisdiction in admiralty, such jurisdiction may not be exercised by a court sitting at law. *Higa v. Transocean Air Lines,* 230 F. 2d 780, 1956 A. M. C. 122 (9th Cir., 1955). The same conclusion was reached under the Admiralty Extension Act, 46 U. S. C. §741, in *Dept. of Highways v. United States,* 204 F. 2d 630, 1953 A. M. C. 2131 (5th Cir.). As Judge Mathes said in *Kunkel v. United States,* 140 F. Supp. 591, 595, 1956 A. M. C. 1195, 1200 (S. D. Cal.), " . . . the inherent and fundamental difference between actions at law and suits in admiralty can never be ignored; and no legislative fiat or judicial indecision can wipe the distinction out."

Any attempt to confuse admiralty and law or substitute the one for the other runs into substantial differences in the practice and procedure to which the parties are entitled under the law. Proceedings at law, like the present one, are governed exclusively by the Federal Rules of Civil Procedure. Rule 81(a)(1) is explicit that the Civil Rules do not apply to an admiralty action. Courts of admiralty, on the other hand, have their own procedure distinct from that at common law. *The Wanata,* 95 U. S. 600 (1877); *Atlee v. Packet Company,* 21 Wall. 389, (1875). That procedure, founded upon the proceedings in civil and ecclesiastical courts as modified by the Supreme

Court's Rules of Practice in Admiralty and Maritime Cases and the rules of local admiralty courts, has entirely different roots and very different features from procedure at law.[2] The Admiralty Rules, of course, have no application to an action at law. *City of Gretna v. Defense Plant Corp.,* 159 F. 2d 412, 1947 A. M. C. 461 (5th Cir.). And just as the litigant at law has a right to have proceedings under the Civil Rules, so the litigant in admiralty has a right to the procedure of the admiralty. See *Jordine v. Walling,* 185 F. 2d 662, 1951 A.M.C. 43 (3rd Cir., 1950).

C. The exclusiveness of the admiralty remedy under the Suits in Admiralty Act may not be circumvented by the device of third party action.

The attempt of Appellants in this case to bring an exclusively admiralty action at law and thus thwart the conditions of the Suits in Admiralty Act at the same time they rely upon it, by filing a third party complaint at law, is without the sanction of any statute or rule whatever. The best that can be said for this procedure is that it is apparently intended to obscure the real nature of the action. It is in fact purely and simply an attempt to sue the United States without its consent.

Appellants' brief, by its single-minded discussion of venue matters, would give the impression that only venue questions were involved in this case. But no matter what ground was assigned for dismissal by the

[2]The foundations and distinctive character of the admiralty proceedure have been reviewed by Judge Fee in *Dowling v. Isthmian Steamship Corp.*, 184 F.2d 758, 1950 A.M.C. 1876 (3rd Cir.) cert. denied 340 U.S. 935.

court below, the question of jurisdiction is always the first and most important question in a federal court. Actually, it is clear from the language of Chief Judge Bowen in his oral opinion (R. 97) that he understood that the court lacked jurisdiction of the third party complaint and that the dismissal must stand upon that ground.[3]

The astonishing thing is that Appellants' attorneys, who are experienced admiralty counsel, should attempt this mode of proceeding, without any sanction in statute or rule and in the face of so much authority that it may not be done. Over the years there have been many attempts to blend admiralty and law by the device of joinder, counterclaim, set-off, intervention, and impleader, but no matter what the device, the admiralty and common law jurisdiction of the

---

[3]If further evidence were needed of the lower court's views on jurisdiction, it was supplied in the unreported case of *Ostrom v. Weyerhaeuser Steamship Co.*, W.D. Wash., Civil No. 4255 (Feb. 20, 1957), in which copies of the proposed third party complaint and the court's order denying leave to file it are set forth in Appendix C. In that case the same attorneys who represent Appellants here attempted to file a case under the Public Vessels Act and Suits in Admiralty Act by a third party complaint at law. Chief Judge Bowen denied them leave to do so, saying in his order:

> ". . . if the defendant and proposed third party plaintiff had sought to initiate the cause of action alleged by it in its proposed third party complaint independently in this district against the United States of America, the Court would have no jurisdiction over the United States of America and over the objections of the United States of America would be unable to compel the United States of America to submit to the Court's jurisdiction; and . . . if it would have no jurisdiction to compel the United States of America to respond to a direct action of the type which the defendant and proposed third party plaintiff attempts to assert here, it likewise is without jurisdiction or power to compel the United States to submit to this Court's jurisdiction under the impleader provisions of Rule 14 of the Federal Rules of Civil Procedure . . ."

District Court may not be blended, and actions in admiralty and at law may not be tried in one suit. The Supreme Court so held in *The Sarah,* 8 Wheat. 391, 394 (1823), saying:

> ". . . Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can [not] be blended. . . ."

The lower courts have followed this rule, pointing out in some instances the difficulties of procedure that would arise from confusion of admiralty with law. *United Transp. & L. Co. v. New York & Baltimore T. Line,* 185 Fed. 386 (2nd Cir., 1911); *Kaufman v. John Block & Co.,* 60 F. Supp. 992, 1945 A. M. C. 343 (S. D. N. Y.); *Moyer v. M & J Tracy, Inc.* 1949 A. M. C. 279 (S. D. N. Y., 1948) (not otherwise reported); *McDonald v. Cape Cod Trawling Corp.,* 71 F. Supp. 888, 892, 1947 A. M. C. 699, 705 (D. Mass.) (". . . But I know of no basis for such a hybrid combination of admiralty and law . . . such an innovation . . . might prejudice the parties . . ."); *Eggleston v. Republic Steel Corp. et al.,* 47 F. Supp. 658, 659 (W. D. N. Y., 1942) (". . . The remedy of the libelant as against the respondent, Republic Steel Company, is through an action at common law. This specifically is an action in admiralty. The two actions cannot be joined.")

There have been many attempts to circumvent this rule by the very device of third party procedure which Appellants have tried here. The courts have re-

peatedly held it to be improper and refused to permit it. *Yone Suzuki Co. v. Argentine Ry., Ltd.,* 27 F. 2d 795, 1928 A. M. C. 1521 (2nd Cir.) cert. den. 278 U. S. 652; *Aktieselskabet Fido v. Lloyd Braziliero,* 283 Fed. 62 (2nd Cir., 1922) cert. den. 260 U. S. 737; *The Bear,* 126 F. Supp. 529, 1955 A. M. C. 1123 (D. Alaska); *Rudy-Patrick Seed Co. v. Kokusai,* 1 F. Supp. 266, 1932 A. M. C. 1508 (S. D. N. Y.); *The Goyaz,* 281 Fed. 259 (S. D. N. Y., 1922) aff'd 3 F. 2d 553, cert. den. 267 U. S. 594; *Reichart Towing Line v. Long Island Machine & Marine Const. Co.* 287 Fed. 269 (E. D. N. Y., 1922); see *Soderberg v. Atlantic Lighterage Corp.,* 19 F. 2d 286, 1927 A. M. C. 907 (2nd Cir.) cert. den. 275 U. S. 542.

As the Court said in the *Aktieselskabet Fido* case, *supra,* at page 74:

> ". . . Now a cause of action which is within the sole jurisdiction of a court of common law cannot be converted into one within the jurisdiction of a court of equity or of a court of admiralty by a mere rule of practice, for it works a change in the substantive law. . . . Of course, there would be constitutional objection, and there are constitutional objections which stand in the way of bringing a common-law action into the admiralty court through the fifty-ninth or the fifty-sixth rule."

And as the Supreme Court has said in *Armour & Co. v. Fort Morgan Steamship Co.,* 270 U. S. 253, 1926 A. M. C. 327, at footnote 1:

> ". . . The application of Admiralty Rule 56 is limited by similar considerations of jurisdiction

[citing *The Goyaz,* and the *Aktieselskabet Fido,* and *Reichart* cases, *supra*]."

More recent attempts to proceed by third party complaint at law on exclusively admiralty claims against the United States have been repelled by the courts in *Dell v. American Export Lines v. United States,* 142 F. Supp. 511, 1956 A. M. C. 1567 (S. D. N. Y.); *Ostrom v. Weyerhaeuser Steamship Co., supra; Durant v. Coastwise Line v. United States,* S. D. Cal., Civil No. 19544 (Jan. 28, 1957) (unreported, Appendix D); and *Mangone v. Moore-McCormack Lines v. American Stevedores and United States,* E. D. N. Y., Civil No. 15951 (Mar. 12, 1957) (not yet reported, Appendix E); see *Cornell Steamboat Co. v. United States,* 138 F. Supp. 16, 20, 1956 A. M. C. 1132, 1143 (S. D. N. Y.).

In the *Mangone* case, in a well-reasoned opinion not yet reported, which is printed as Appendix E to this brief, Judge Bruchhausen of the Eastern District of New York held that the claim, being exclusively under the Suits in Admiralty Act, could not be prosecuted at law by third party complaint. In so holding, Judge Bruchhausen not only recognized the barriers of jurisdiction but reviewed the difficulty, or rather impossibility, of the court's trying to sit at one and the same time under two sets of rules and two different modes of practice, saying in part:

"Since the admiralty court would have jurisdiction, and since jurisdiction would be excluded on the civil side, the question remains whether the Federal Court can try the civil and admiralty

actions together, or more particularly, whether the Court can at the same time sit as a court of law and a court of admiralty."

* * *

"It has been held that a third party libel under the 56th Rule must be maritime in nature [citations]. It seems conversely that a third party complaint, under Rule 14 of the Federal Rules of Civil Procedure, should be civil in nature. In fact, Rule 81(a)(1) of the Federal Rules expressly provides that said rules do not apply in admiralty.

"While there are some decisions permitting a joinder of jury and non-jury causes, the difficulties encountered therein are minimal by comparison to those in the case at bar. To combine these two jurisdictions together in one litigation seems improper and not feasible.

"Under Civil Rule 14 a party may not be impleaded simply because it is or may be liable to the plaintiff, but only, since the 1946 amendment, upon the ground that it is liable to the impleading defendant; under Admiralty Rule 56 a party may be impleaded upon either ground. [citation]

"Under Civil Rule 14, the Government would not be liable unless the third party defendant satisfied the original judgment [citations]. Under Admiralty Rule 56 libelant is entitled to recover directly against an impleaded respondent for damages caused by the latter's negligence. When a person or vessel is impleaded under this rule, the case is treated as if the libel had originally been filed against it, and the decree may so provide. [citations]

"The District Court must also consider whether the claim against the Government is maintained in rem or in personam, both of which are permitted by the Suits in Admiralty Act. [citation]

"Variations in pre-trial procedure and evidence greatly augment the difficulties. A recent decision of the Court of Appeals of this Circuit in Paduono v. Yamashita Kison Kabushiki Zaiaba, 2 Cir., 221 F. 2d 615, demonstrates, quite clearly, the basic and historical differences between the civil and admiralty jurisdictions. To allow the admiralty jurisdiction, which is constitutional, to be so adulterated by civil diversity jurisdiction, which has come under severe criticism, would impair the usefulness of that ancient and historic tribunal. [citation]."

The difficulty about procedure in this case is manifest from the outset. Defendant must show some authority to implead the United States. But Civil Rule 14 does not apply to an action in admiralty, not only because such a rule cannot work a jurisdictional change, but by virtue of the express provision of Civil Rule 81(a) (1). On the other hand, Admiralty Rule 56 has no application to an action at law. Nor can the two rules be taken together in some vague manner to produce the result which neither can achieve alone, since the rights of the parties differ under the two rules and it is absolutely essential to know under which rule the case is proceeding. When the attempt is made, as here, to blend an admiralty proceeding with a proceeding at law, the result is that there is no set of rules and no procedure, either that of the admiralty

or that of the law, applicable to the entire proceeding and to all the parties.

Appellants rely upon the cases of *Skupski v. Western Navigation Co.,* 113 F. Supp. 726, 1953 A. M. C. 1441 (S. D. N. Y.) and *Canale v. American Export Lines,* 17 F. R. D. 269, 1956 A. M. C. 1344, 1350 (S. D. N. Y., 1955). In neither the *Skupski* nor the *Canale* case did the judge come to grips with the jurisdictional problem under the controlling authorities established by the Court of Appeals for his own circuit, nor with the problems of procedure presented by the attempt to mingle the jurisdictions. In evaluating the *Skupski* and *Canale* cases, it is most significant that in neither case was the Government ultimately required to pay a judgment[4] and that the opportunity was therefore not presented to appeal the rulings to the Court of Appeals and secure their reversal under the rule expressed by that court in the cases already cited above.[5]

The *Skupski* and *Canale* cases have not only been considered and rejected by Judge Bruchhausen in the *Mangone* case, but have been rejected and not since followed in their own district, the Southern District of New York. Judge Dimock of that district said in *Cornell Steamboat Co. v. United States,* 138 F. Supp. 16, 20, 1956 A. M. C. 1132, 1143:

---

[4]In the *Canale* case the final disposition by dismissal appears at 1956 A.M.C. 1350.

[5]*Yone Suzuki Co. v. Argentine Ry., Ltd.,* 27 F.2d 795, 1928 A.M.C. 1521 (2nd Cir.); *Aktieselskabet Fido v. Lloyd Braziliero,* 283 Fed. 62 (2nd Cir., 1922).

> ". . . While *Skupski v. Western Nav. Corp.* . . . permitted joinder of an admiralty claim with a law claim, there seems to be overwhelming authority against such consolidation. . . ."

And more recently, in *Dell v. American Export Lines v. United States,* 142 F. Supp. 511, 1956 A. M. C. 1567 (S. D. N. Y.) the court reviewed the jurisdictional difficulties with particular reference to the fact that the attempt to proceed by third party complaint at law was an attempt to sue the United States without its consent and concluded that the court did not have jurisdiction even to transfer the third party complaint to the admiralty side of court with the rest of the case, but could only dismiss.

A recent decision of this Court, although concerned with a counterclaim against the United States under Civil Rule 13, rather than a third party complaint under Civil Rule 14, is absolutely determinative of the present contention that the Rules may be made the basis for jurisdiction against the United States outside the terms of the statute. In *United States v. Finn,* 239 F. 2d 679 (9th Cir., 1956), this Court held that, particularly in view of Civil Rule 82, Civil Rule 13 could not be made the basis of a counterclaim against the United States for which no statutory authority could be shown. The principles of that decision are as applicable to this attempt under Civil Rule 14 as to that one under Civil Rule 13.

D. The court having no assets or property in its possession, the doctrine of ancillary jurisdiction has no application.

Faced with overwhelming authority that the court lacks jurisdiction at law of the third party complaint based upon the Suits in Admiralty Act, Appellants fall back upon the specious contention that there is "ancillary jurisdiction" of the third party complaint. That ancillary jurisdiction does not exist is clearly laid down by the Supreme Court in *G. & C. Merriam Co. v. Saalfield and Ogilvie,* 241 U.S. 22 (1916) and in *Fulton Nat. Bank v. Hozier,* 267 U.S. 276, 280 (1925) where the Court said:

> "The general rule is that when a federal court has properly acquired jurisdiction over a cause it may entertain, by intervention, dependent or ancillary controversies; but no controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit. . . ."

The record discloses that this case involves no assets or property whatever in the possession or control of the court and there is therefore not the slightest foundation for appellants' suggestion of "ancillary jurisdiction."

Even where the attempted use of third party actions did not go so far as to try to mingle law and admiralty, as here, but only dealt with common law claims, the courts have held that the third party complaint may not be sustained in violation of ordinary rules of jurisdiction and venue, in reliance upon any such notion of ancillary jurisdiction or venue as Ap-

pellants advance. *Friend v. Middle Atlantic Transp. Co.,* 153 F.2d 778 (2nd Cir., 1946) cert. denied 328 U.S. 865; *Akers Motor Lines v. Newman,* 168 F.2d 1012 (5th Cir., 1948) cert. denied 335 U.S. 858; *R.F.C. v. Duke,* 14 F.R.D. 265 (D. Md., 1953).

Appellants rely upon the case of *United States v. Acord,* 209 F.2d 709 (10th Cir., 1954), which involved only a venue question rather than the jurisdictional question presented here. Not only is the *Acord* case contrary to the Supreme Court's holdings cited above, but also in conflict with the Tenth Circuit's own decisions, both before and after, in *Oils Inc. v. Blankenship,* 145 F.2d 354 (10th Cir., 1945) cert. denied 323 U.S. 803, and *Aetna Ins. Co. v. Chicago, Rock Island & P.R.R.,* 229 F.2d 584 (10th Cir., 1956). Had that court only consulted its own decisions it would have avoided the error into which it fell in *Acord.* There is no reason why this Court should now be asked to fall into the same error, or what is in truth a more grievous one.

II.

APPELLANTS FAILED TO COMPLY WITH THE RESTRICTIONS OF THE SUITS IN ADMIRALTY ACT UPON THE PLACE OF SUIT.

Not only did the court below not have jurisdiction but the venue of Appellants' claim was incurably defective. The proper venue for Appellants' claim under the Suits in Admiralty Act is in one of the districts of New York, the state of Appellants' corporate residence.

The Suits in Admiralty Act provides, at 46 U.S.C. § 742, as follows:

> ". . . Such suits shall be brought in the District Court of the United States for the district in which the parties are suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found . . ."

The sole allegation of the third party complaint relative to venue is the statement in Paragraph I (R. 7) that "third party plaintiff was and is a foreign corporation organized and existing under the laws of the State of New York, and at all times herein mentioned was and is doing business within the jurisdiction of this court." From the start it has appeared on the record, therefore, that the venue of the claim lay in New York.

Nothing is better settled than the rule that suits against the United States can be maintained "only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose." *Reid v. United States,* 211 U.S. 529, 538 (1909). The strict conditions of suit against the United States apply to the place where suit is brought as well as to the subject matter of the suit. *Argonaut Navigation Co. v. United States,* 142 F. Supp. 489, 1956 A.M.C. 1698 (S.D. N.J.); *Simonsen v. United States,* 22 F. Supp. 239, 1938 A.M.C. 298 (E.D. Pa.); *United Merchants & Manufacturers, Inc. v. United States,* 123 F. Supp. 435 (M.D. Ga., 1954); *Miller v. United States,* 76 F. Supp. 523, 525 (W.D. Wash., 1948). Ap-

pellants may search in vain for any authority that the United States has consented to be sued by third party complaint in a district where it has not consented to be sued by original libel or complaint. Nor is it reasonable to suppose that the United States is willing to be sued in whatever district may be chosen by an original libelant or plaintiff who is a stranger making no claim whatsoever against the United States.

In accordance with these well-settled principles, an impleading petition against the United States may be filed under the Suits in Admiralty Act only in a district where the petitioner resides or has his principal place of business or in which the vessel or cargo charged with liability (in the case of *in rem* claims) is found. *The Ionian Leader,* 100 F. Supp. 829, 1952 A.M.C. 161 (D. N.J., 1951); *The Cotati,* 2 F.2d 394, 1924 A.M.C. 149 (S.D. N.Y., 1923). This rule follows the rule with respect to libels against the United States, plainly set forth in the Act and enforced in the following cases, among others: *Carroll v. United States,* 133 F.2d 690, 1943 A.M.C. 339 (2nd Cir.); *Untersinger v. United States,* 172 F.2d 298, 1949 A.M.C. 234 (2nd Cir.).

Not only must the petitioner observe the venue provisions of the Suits in Admiralty Act, but it must plead facts in its impleading petition showing that the venue is properly laid, and the petition will be dismissed for failure to do so. *The Cotati, supra; Sawyer v. United States,* 66 F. Supp. 271, 1946 A.M.C. 420 (S.D. N.Y.); *Piascik v. United States,* 65 F. Supp. 430, 1944 A.M.C. 1350 (S.D. N.Y.).

Appellants, both New York corporations, plainly do not reside in Western Washington, the district of residence being in the state of incorporation. *Suttle v. Reich Bros. Construction Co.,* 333 U.S. 163 (1948). Appellants do not even contend that their principal place of business was within the Western District of Washington. Indeed, by failure to deny, or to reply in any way, third party plaintiffs admitted the statements of the Government's Request for Admission of Facts (R. 26) including the statements of non-residence and lack of principal place of business in the district (R. 28).

Both in the record and in their brief, Appellants have belabored at length the irrelevant question of the sometime presence of the SEACORONET in the Western District of Washington. Were Appellants' claim an *in rem* claim against the vessel, this point might have significance, but since the vessel was their own and they are not proceeding against her or charging liability against her, their contentions are without merit. In this action, which is not an *in rem* action, or an action on *in rem* rights or principles,[6] neither the vessel nor the cargo is "charged with liability" within the meaning of the Suits in Admiralty Act. Even if, in some loose sense, the claim against the United States could be considered to charge cargo with liability, it is uncontradicted in the record that the cargo

---

[6]A libelant electing to proceed on *in rem* principles must so state in his libel. *Schnell v. United States,* 166 F.2d 479, 1948 A.M.C. 769 (2nd Cir.) cert. denied 334 U.S. 833; *Grillea v. United States,* 229 F.2d 687, 232 F.2d 919, 1956 A.M.C. 553, 1009 (2nd Cir.). There is no such election in this case.

was not located in the Western District of Washington. This was established by the Affidavit of Keith R. Ferguson (R. 14) and the Request for Admission of Facts and Genuineness of Documents (R. 26).

This case turns, of course, upon a manifest lack of jurisdiction, but because of the confusion of views reflected in the record and in Appellants' brief concerning the venue provisions of the Suits in Admiralty Act, counsel take this opportunity to explain to the Court the logic of those provisions and to demonstrate that they do not represent the kind of legal grab bag suggested by Appellants' contentions.

The Suits in Admiralty Act provides a remedy for both *in personam* and *in rem* rights, 46 U.S.C. § 743; *Johnson v. Fleet Corporation,* 280 U.S. 320, 1930 A.M.C. 1. When the Act, at 46 U.S.C. § 742, speaks of "vessel or cargo charged with liability," it refers only to actions upon *in rem* principles, based upon a maritime lien on the vessel or cargo. *The Elmac,* 285 Fed. 665 (S.D. N.Y., 1922); *The Anna E. Morse,* 287 Fed. 364, 368, 1923 A.M.C. 1049, 1054 (S.D. Ala.); see *The Henry S. Grove,* 287 Fed. 247, 250, 1923 A.M.C. 366, 369 (W.D. Wash.).

Thus, the result is that where an *in rem* claim is made, the libelant may choose to sue in the district where the *res* is found at the time the libel is filed[7] or

[7]There is a suggestion by Appellants' counsel in the record (R. 79) that presence of the *res* at any time during the action might be adequate. But presence at the time the libel is filed is what is required. *Untersinger v. United States,* 172 F.2d 298, 1949 A.M.C. 234 (2nd Cir.). The court below correctly considered that presence at the time of filing the libel would be necessary. "You either have

in the district of libelant's residence or principal place of business; but where, as here, only an *in personam* claim is presented and there is no *res* involved, the libelant must sue only at its residence or principal place of business. As the court said in *The Anna E. Morse, supra,* "To this extent, at least, the act gives no alternative venue in proceedings in personam . . ." This entire arrangement of venue concurs and harmonizes with similar distinctions as to jurisdiction of *in rem* and *in personam* claims, in accordance with *Blamberg Bros. v. United States,* 260 U.S. 452, 1923 A.M.C. 50, under which jurisdiction of *in rem* claims under the Suits in Admiralty Act depends upon the actual presence of the vessel or cargo within the jurisdiction.

Appellants make much of *Hoiness v. United States,* 335 U.S. 297, 1948 A.M.C. 1909. *Hoiness* holds only that the venue provisions of the Suits in Admiralty Act may be waived. But there is no waiver here. On the contrary, the record shows that the United States objected at the earliest moment and repeatedly thereafter to the improper venue and the failure to plead facts showing venue. These were among the grounds of the Government's motion to dismiss (R. 12) which was denied with leave to renew (R. 21). At the opening of trial the Government renewed and reserved all the grounds of its motion and its objections already made, and Government counsel stated that the Government was present only to protect its record on such

---

to have the thing here or you have to have the United States as the *owner* of the thing here, and the time when the thing was here that is important is the time of the commencement of the action . . ." (emphasis supplied) (R. 79).

objections (R. 49). Subsequently (R. 53-54) the Court granted the Government's request that its objections already made be deemed continuing. At the opening of proceedings on the third party complaint, Government counsel again renewed all its objections to the trial (R. 57). And, finally, when evidence of the presence of the SEACORONET at Seattle was offered, Mr. Staring, for the Government, objected that such evidence was irrelevant and immaterial (R. 59, 67) and consistently maintained that objection, pointing out to the court once again (R. 81) that the third party complaint was devoid of any allegation under which any proof of venue could be made. If ever there was a case in which care was taken not to waive venue, this is that case.

The court below correctly dismissed the third party complaint for failure to plead facts showing consent of the United States to be sued in the Western District of Washington and for the actual absence of such consent, as abundantly shown by the record.

III.

THE DISTRICT COURT CORRECTLY DENIED APPELLANTS' MOTION TO TRANSFER.

After having chosen the court below in which to sue the United States, third party plaintiffs, after more than a year's notice of the Government's defenses, within which they could have brought a proper libel in the proper venue, and after filing the notice which commenced this appeal, sought to have the court below

transfer half of this case to another district, without justification in principle or precedent and in defiance of the jurisdiction of this Court of Appeals.[8] Nothing in 28 U.S.C. § 1406 authorizes a court without jurisdiction to take jurisdiction in order to transfer such a case. Section 1406 permits only the transfer for defective venue of cases of which the court has jurisdiction.

Since the court in this case lacked jurisdiction of the third party action from the outset, it manifestly could not have granted Appellants' motion to transfer the third party complaint to New York, even if the motion had otherwise had any merit. *Burns v. Chubb,* 99 F. Supp. 581 (E.D. Pa., 1951); *Fistel v. Beaver Trust Co.,* 94 F. Supp. 974 (S.D. N.Y., 1950; *Scar-*

---

[8]This appeal was started by a notice of appeal (R. 33) filed July 17, 1956. The notice (R. 39) filed September 7, 1956 did no more than broaden the scope of the appeal to include the dismissal of the third party complaint. This brings to light that, for an additional reason, the court below lacked jurisdiction to entertain the motion for transfer. Although the first notice of appeal was premature when filed, upon the entry of the order of July 27, 1956, dismissing the third party complaint, which was a final order since it disposed of the remainder of the claim [Civil Rule 54(b); *In re Forster Chain Corp.,* 177 F.2d 572 (1st Cir., 1949)] the judgment entered earlier on June 20, 1956 in favor of plaintiff became final and the notice of appeal on file became effective under the controlling decisions of the Supreme Court in *Lemke v. United States,* 346 U.S. 325 (1953) and *Luckenbach S.S. Co. v. United States,* 272 U.S. 533 (1926). An appeal having been effectively taken, the case was exclusively within the jurisdiction of the Court of Appeals and the court below had no further jurisdiction over the judgments and orders entered. *The Rio Grande,* 23 Wall. 458 (1875). Any notion that a portion of a third party action may remain within the jurisdiction of the district court in these circumstances is put to rest by the language of Civil Rule 54(b) itself and by the policy underlying that rule and 28 U.S.C. § 1291, which is that appeals from cases such as this shall not go up piecemeal, on one part of the case at a time. *Catlin v. United States,* 324 U.S. 229 (1945).

modo v. Mooring, 89 F. Supp. 936 (S.D. Tex., 1950); *Dell v. American Export Lines v. United States,* 142 F. Supp. 511, 1956 A.M.C. 1567 (S.D. N.Y.). From the *Dell* case it appears, moreover, that such a transfer, if made, would very properly be refused by the court in New York. Upon its appearing that the court lacked jurisdiction, the only course it was empowered to take was to dismiss, as it did. *Joy v. Hague,* 175 F. 2d 395 (1st Cir., 1949) cert. denied 338 U.S. 870; *Battaglia v. General Motors Corp.,* 169 F. 2d 254 (2nd Cir., 1948), cert. denied 335 U.S. 887.

The suggested transfer of part of a third party action does violence to the very purpose of such an action. Appellants can show no authority for such a transfer for the obvious reason that a three party action is only one suit. See *Glens Falls Indemnity Co. v. Atlantic Bldg. Corp.,* 199 F. 2d 60 (4th Cir. 1952); *Piedmont Interstate Fair Assn. v. Bean,* 209 F. 2d 942 (4th Cir., 1954); *Thomas v. Malco Refineries,* 214 F. 2d 884 (10th Cir., 1954). And the purpose of Civil Rule 14, on which third party plaintiffs have relied, is not to "enable a single lawsuit to be converted into two." *Brown v. First Nat. Bank,* 14 F.R.D. 339, 340 (E.D. Okla., 1953).

The transfer of a portion of the case would have presented a flagrant abuse of Civil Rule 14, the very object of which is to bring claims into one suit, by imposing upon the United States two separate trials in two separate courts in what purports to be one case. After the two trials would come two appeals, the one already pending in this Court at that time and then

another, from the judgment on the third party complaint, in the Court of Appeals for the Second Circuit. Thus two courts of appeals would be asked to pass upon interdependent questions of liability arising in large part from the same record of trial. Such a preposterous and confusing imposition upon the courts was never intended and can not be justified in the transfer statute. It may fairly be said that the attempt to transfer would have been an inexcusable affront to the jurisdiction of this Court of Appeals by attempting to deprive this Court of jurisdiction of part of a case when the case was then actually on appeal before it.

The Appellants, from their conduct of this and the related litigation, were scarcely entitled to claim any special consideration from the court below, even had the court had the power to give it. This complex of cases presents a clear abuse of judicial procedures. Not only did Appellants sue the United States separately in the seven cases now consolidated on appeal here (R. 99) but in three other cases[9] in the same court below, which were voluntarily dismissed by the libelants without collection. In addition, Appellants filed the libel in the Southern District of New York set forth in Appendix B and, as recently as Mar. 6, 1957, filed, inexplicably, another third party complaint

---

[9]*Basnight v. Orion Shipping & Trading Co. and Pacific Cargo Carriers v. United States,* W.D. Wash., Admiralty No. 16059; *Morriss v. Orion Shipping & Trading Co. and Pacific Cargo Carriers v. United States,* W.D. Wash., Admiralty No. 16060; *Wilcox v. Orion Shipping & Trading Co. and Pacific Cargo Carriers v. United States,* W.D. Wash., Admiralty No. 16061.

at law, this time in New York (Appendix F). All this in the face of the fact that the single libel in New York could have been drawn to claim indemnity for all the various seamen's suits against Appellants for chlorine injuries wherever in the country they were pending[10].

Instead of following the simple and rational course of a single libel in New York, with a single trial and a single record, Appellants have harassed the United States with all the several suits pointed out above and have, in the main, used third party procedure to accomplish this multiplicity of action. What is more, upon receiving the warning of Judge Lindberg's dismissal of the *Aregood* case (R. 6) and upon being further warned by Judge Bowen's order (R. 21) that the jurisdictional and other objections of the Government would remain open for decision at trial, Appellants, over many months, did nothing to protect their claim by bringing a proper suit in admiralty. Against this record, the refusal of the judge to exercise his discretion to transfer had he had any discretion, would have been fully justified.

---

[10]A libel in admiralty would not, as Appellants suggest (R. 94), have been subject to dismissal for prematurity. 2 Benedict, *Admiralty* 77 (6th ed.) and cases cited there. Such a libel would not in fact have been premature at any time after the chlorine incident, since the cause of action, if any, was then complete, only the amount of damages remaining to be ascertained. *Wilcox v. Plummer*, 4 Pet. 172 (1830); *United States v. Atlantic Mutual Ins. Co.*, 298 U.S. 483, 1936 A.M.C. 993.

CONCLUSION.

For all of the foregoing reasons, but primarily because the lower court lacked jurisdiction from the outset, the decision of the lower court should be affirmed.

GEORGE COCHRAN DOUB,
Assistant Attorney General,
CHARLES P. MORIARTY,
United States Attorney,
LEAVENWORTH COLBY,
KEITH R. FERGUSON,
Special Assistant to the Attorney General,
GRAYDON S. STARING,
Attorney, Department of Justice,
Attorneys for Appellee.

(Appendices A, B, C, D, E and F Follow.)

Appendices.

Appendix A

STATUTES AND RULES.

The pertinent provisions of the suits in admiralty act, 46 U.S.C. §§ 741 *et seq.* read as follows: § 741. Exemption of United States vessels and cargoes from arrest or seizure—No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provisions herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions . . .''

§ 742. Libel in personam—In cases where if such vessels were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of busi-

ness in the United States, or in which the vessel or cargo charged with liability is found. . . .

§ 743. Procedure in cases of libel in personam. . . . If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. . . .

Rule 56 of the Rules of Practice in Admiralty and Maritime Cases provides as follows: In any suit, whether in rem or in personam, the claimant or respondent (as the case may be) shall be entitled to bring in any other vessel or person (individual or corporation) who may be partly or wholly liable either to the libelant or to such claimant or respondent by way of remedy over, contribution or otherwise, growing out of the same matter. This shall be done by petition, on oath, presented before or at the time of answering the libel, or at any later time during the progress of the cause that the court may allow. Such petition shall contain suitable allegations showing such liability, and the particulars thereof, and that such other vessel, or person ought to be proceeded against in the same suit for such damage, and shall pray that process be issued against such vessel or person to that end. Thereupon such process shall issue, and if duly served, such suit shall proceed as if such vessel or person had been originally proceeded against; the other parties in the suit shall answer the petition; the claimant of such vessel or such new party shall answer the libel; and such further proceedings shall be had and

decree rendered by the court in the suit as to law and justice shall appertain. But every such petitioner shall upon filing his petition, give a stipulation, with sufficient sureties, or an approved corporate surety, to pay the libelant and to any claimant or any new party brought in by virtue of such process, all such costs, damages, and expenses as shall be awarded against the petitioner by the court on the final decree, whether rendered in the original or appellate court; and any such claimant or new party shall give the same bonds or stipulations which are required in the like cases from parties brought in under process issued on the prayer of a libellant.

The pertinent provisions of the Federal Rules of Civil Procedure read as follows:

Rule 14. Third-Party Practice—(a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the

third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-libels as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

* * *

Rule 81. Applicability in General

(a) To What Proceedings Applicable

(1) These rules do not apply to proceedings in admiralty. . . .

Rule 82. Jurisdiction and Venue Unaffected—These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.

Appendix B

AMENDED LIBEL IN PACIFIC CARGO CARRIERS CORP. v. UNITED STATES S.D. N.Y., ADMIRALTY NO. 189-35.

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The amended libel and complaint of PACIFIC CARGO CARRIERS CORP., as Owner of the S.S. SEACORONET

against

UNITED STATES OF AMERICA, in a cause of contract and indemnity, civil and maritime, alleges upon information and belief, as follows:

FOR A FIRST CAUSE OF ACTION

First: At all the times hereinafter mentioned, the libelant, Pacific Cargo Carriers Corp., was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 80 Broad Street, in the City, County and State of New York, and was the owner of the S. S. SEACORONET, which, prior to the occurrences hereinafter described, was tight, staunch, strong and in all respects seaworthy.

Second: Respondent, the United States of America, a corporate sovereign, was at all times hereinafter mentioned, through its Department of the Navy, (Military Sea Transportation Service) the Time Charterer of the said vessel, and has by law consented to be sued herein.

Third: On or about the 22nd day of April, 1952, libelant and respondent entered into a written time charter party (NSTS Contract No. 1102) wherein and whereby libelant, as owner, agreed to and did let, and respondent, as Charterer, agreed to and did hire the S. S. SEACORONET, upon the terms and conditions set forth in said time charter party and written extensions thereof. A true copy of said charter party and the extensions thereof, are annexed hereto, made a part hereof and marked Exhibit "A".

Fourth: On or about August 17, 1953, while the aforesaid time charter was in force and effect, the S. S. SEACORONET, was, pursuant to directions of respondent and in accordance with the terms and conditions of the said contract of time charter, at the port of Pusan, Korea.

Fifth: At the said port of Pusan, Korea, and on the said date, respondent was, pursuant to the terms of the aforesaid contract of charter party, loading a cargo into the holds of the S. S. SEACORONET. The said cargo consisted in part, of gas cylinders, which the Master and officers of the said vessel had been informed and believed were empty and, free of gas. At about 2230 hours on said date, and while the said gas cylinders were being loaded by personnel engaged by, and under the supervision and control of respondent, a gas cylinder was caused to be loaded into the No. 5 hold of the vessel. Said gas cylinder was either defective or was otherwise damaged, during the loading operation and was not empty and free of contents, but on the contrary contained harmful and

poisonous gas, and said gas was permitted by respondent, its agents, servants and/or employees, to escape and penetrate various compartments of the vessel, including, among others, the crew quarters.

Sixth: The aforesaid escape of harmful and poisonous gas, at the time and on the occasion hereinbefore referred to, was due to the failure and neglect on the part of respondent, and/or those under its control, to comply with and properly perform the duties and obligations of respondent, under the terms of the aforesaid contract of charter party in that the said cargo of gas cylinders was not properly loaded and due care was not given to the stowage thereof, and respondent knew, or should have known, such cargo was of a dangerous and poisonous nature, and respondent loaded such dangerous and poisonous cargo at its own risk.

Seventh: The escape of the harmful and poisonous gas, at the time and on the occasion heretofore referred to herein, was not due to any fault, neglect or want of care on the part of the S. S. SEACORONET or on the part of libelant, its agents, servants or employees, or on the part of the officers and crew of the S. S. SEACORONET, nor was the said cargo, or the loading thereof, under libelant's control.

Eighth: Under the terms and conditions of the aforesaid contract of charter party, the respondent was required to and did assume all responsibility for the loading and discharging of the S. S. SEACORONET and for the acts or failures to act of the persons engaged by it to accomplish the loading and discharging.

Ninth: At the times heretofore referred to herein, libelant had in its employ, as a member of the crew of the S. S. SEACORONET, one Robert L. Wilson, who served thereon in the capacity of Third Cook and Messman.

Tenth: The said Robert L. Wilson as a member of the crew of the said vessel, was lawfully aboard same on the 17th day of August, 1953, when the said vessel was at the port of Pusan, Korea. Alleging exposure to and contact with the harmful and poisonous gas fumes which escaped from a gas cylinder, as heretofore described herein, said Robert L. Wilson has made claim against libelant for damages and has asserted, that by reason of contact with said gas fumes, he was rendered sick and sustained severe and permanent personal injuries.

Eleventh: Heretofore, and on or about the 23rd day of June, 1954, the said Robert L. Wilson commenced an action against libelant and its managing agent, Orion Shipping & Trading Co., Inc., wherein and whereby he sought recovery of damages in the amount of $6,000.00, of and from the libelant, as his employer, for the alleged injuries and/or illnesses resulting from contact with harmful and poisonous gas, under the circumstances and at the time heretofore referred to herein. Said action against libelant and its managing agent, was commenced by the said Robert L. Wilson in the City Court of the City of New York County of New York (Index #T681/54). A true copy of the complaint of said Robert L. Wilson, to said action, is annexed hereto, made a part hereof and marked Exhibit "B".

Twelfth: Libelant denied that it was in any way responsible for the illness and/or injuries as alleged by said Robert L. Wilson, but admitted that as employer of the crew of the S. S. SEACORONET it owed to said person an obligation to provide a safe place in which to work and warranted to him, by implication of law, the seaworthiness of the said vessel.

Thirteenth: Heretofore, libelant, through the Master of the S. S. SEACORONET, gave due notice to respondent through its Department of the Navy (Military Sea Transportation Service) of the incident concerning the escape, from a cylinder, of the poisonous gas heretofore referred to herein, and respondent had actual knowledge thereof. Thereafter, and by letter dated February 26, 1955, the attorneys for libelant gave due notice to respondent of the pendency of the aforesaid action of the said Robert L. Wilson, in the City Court of the City of New York, County of New York, and respondent was thereby called upon to assume and/or assist in the defense of the said City Court action and respondent was informed that upon its failure to do so, and in the event of a recovery by the plaintiff therein, libelant would look to respondent for reimbursement. Said letter was directed by registered mail to respondent through its United States Attorney for the Southern District of New York, and a copy thereof was sent to respondent's Attorney in Charge, Admiralty & Shipping Section of its Department of Justice. Thereafter, respondent was duly informed by the attorneys for libelant, by letter dated February 27, 1956, and addressed to the said Attorney in Charge of its Department of Justice, Admiralty

& Shipping Section at the U. S. Courthouse, Foley Square, New York, New York, that the said action of Robert L. Wilson against libelant, pending in the said City Court of the City of New York, County of New York, had been called on the trial calendar of said Court on the 23rd day of February, 1956 and that in accordance with the procedure followed in said City Court of the City of New York, the Justice then presiding explored with counsel for the respective parties, the possibilities of settlement, and that as a result of said conference with the Court, the Justice there presiding, suggested that the case be compromised and settled for the sum of $750.00, over and above the sum of $136.00, which had earlier been paid by libelant to said Robert L. Wilson for maintenance and cure due to said Robert L. Wilson under the General Maritime Law of the United States.

Fourteenth: Respondent refused and neglected to take any part, either in the defense of the said action of said Robert L. Wilson, or in the settlement thereof.

Fifteenth: Libelant was advised by its attorneys, in the light of the probabilities of said Robert L. Wilson being successful, in ultimately recovering a judgment against it, in excess of the amount at which the action could be compromised and settled, and in view of the recommendation of settlement, made by the Justice presiding at the settlement conference heretofore referred to herein, that a settlement and compromise of said action for the sum of $750.00, in addition to the sum of $136.00 which had been earlier advanced to said Robert L. Wilson for maintenance and cure, was reasonable and prudent and in the best interests of libelant.

Sixteenth: Thereafter, respondent having refused and neglected to approve said compromise and settlement and to admit its liability therefor, and libelant, being satisfied that the said settlement and compromise of the aforesaid action of Robert L. Wilson, upon the basis heretofore stated herein, was reasonable and prudent, approved said settlement and compromise.

Seventeenth: As a result of the foregoing, libelant had good cause to and did pay to the said Robert L. Wilson the sums of $750.00 and $136.00 as heretofore mentioned herein, and in addition, libelant has necessarily incurred, and did pay, legal expenses and disbursements, in the amount of $344.65, as a result of the aforesaid action brought by the said Robert L. Wilson.

Eighteenth: Thereafter, the said compromise and settlement was duly accomplished, and on or about June 19, 1956, libelant paid to said Robert L. Wilson, the sum of $750.00 (the sum of $136.00 having been earlier paid to him), and libelant obtained a release from said Robert L. Wilson executed on the 15th day of June, 1956 and the aforesaid action, pending in the City Court of the City of New York, County of New York, was duly discontinued, of record.

Nineteenth: By reason of the premises aforesaid and in consequence of the matters heretofore stated herein, libelant has sustained damages in the amount of One Thousand Two Hundred Thirty and 65/100 Dollars ($1,230.65), no part of which has been paid by respondent to libelant although duly demanded.

Twentieth: It is the duty of respondent, by reason of the matters aforesaid and pursuant to the terms and conditions of the contract of charter party, heretofore described herein, to indemnify libelant for its damages, as aforesaid, in the said amount of $1,230.65 as set forth herein.

Twenty-First: Libelant elects to proceed herein on *in personam* principles under the Suits of Admiralty Act (46 U.S.C. 741, et seq.).

Twenty-Second: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

FOR A SECOND CAUSE OF ACTION

Twenty-Third: Libelant repeats and realleges, as fully as though herein again set forth at length, each and every allegation contained in Articles First through Eighth, inclusive, Twenty-First and Twenty-Second of this amended libel.

Twenty-Fourth: At the times heretofore referred to herein, libelant had in its employ as members of the crew of the SS SEACORONET the following seamen who served in the following capacities:

Charles E. Aregood, Chief Steward;
Joseph Mitchell, Ordinary Seaman;
George Lewis, Deck Maintenance;
Willie Holmes, Third Cook;
Willie B. Basnight, Utility Man;
Arthur G. B. Morriss, Chief Mate;
Ben Wilcox, 2nd Assistant Engineer.

Twenty-Fifth: The seamen named in Article Twenty-Fourth hereof as members of the crew of the S.S. SEACORONET were lawfully aboard same on the 17th day of August, 1953, when the said vessel was at the Port of Pusan, Korea. Alleging exposure to and contact with the harmful and poisonous gas fumes which escaped from a gas cylinder, as heretofore described herein, the said seamen made claim against libelant for damages, and asserted that by reason of contact with said gas fumes, they were rendered sick and sustained severe and permanent personal injuries.

Twenty-Sixth: Heretofore and on various dates, seamen Aregood, Mitchell, Lewis and Holmes commenced actions against libelant in the United States District Court for the Western District of Washington, Northern Division, and seamen Basnight, Morriss and Wilcox commenced actions against libelant in the United States District Court for the Eastern District of Pennsylvania, wherein and whereby they sought recovery of damages in varying amounts of and from the libelant as their employer for the alleged injuries and/or illnesses resulting from contact with harmful and poisonous gas, under the circumstances and at the time heretofore referred to herein. The said actions brought by seamen Basnight, Morriss and Wilcox in the United States District Court for the Eastern District of Pennsylvania were subsequently transferred on order of the said Court to the United States District Court for the Western District of Washington, Northern Division, and there consolidated for purposes of trial with the actions there originally brought.

Twenty-Seventh: Libelant denied that it was in any way responsible for the illnesses and/or injuries as alleged by the said seamen, but admitted that as employer of the crew of the S.S. SEACORONET, it owed to such persons an obligation to provide a safe place in which to work and warranted to them, by implication of law, the seaworthiness of the said vessel.

Twenty-Eighth: Heretofore, libelant, through the Master of the S.S. SEACORONET, gave due notice to respondent through its Department of the Navy (Military Sea Transportation Service) of the incident concerning the escape, from a cylinder, of the poisonous gas heretofore referred to herein, and respondent had actual knowledge thereof.

Twenty-Ninth: Thereafter, the respondent was impleaded in the said actions brought as set forth in Article Twenty-Sixth on the ground that it was or might become liable to libelant for any monies it was called upon to pay. Respondent became a party defendant thereto and was represented by counsel at the subsequent trial of the actions.

Thirtieth: The trial of the actions aforesaid resulted in jury verdicts for the plaintiff seamen in varying amounts against libelant and thereafter judgments were entered upon said verdicts. The United States District Judge presiding at the trial having reserved to himself decision as to the right of libelant to indemnity, subsequently dismissed the claim without prejudice on the ground that the Court lacked jurisdiction of the respondent. Appeals were noticed from the judgments in favor of the said seamen but

were subsequently discontinued when upon consideration of the record, it was deemed in the best judgment of counsel that no reversible error had been committed. Respondent was given due notice of the decision to discontinue the appeals and to pay the judgments with interest then owing and was requested to take over the prosecution of the appeals if it so desired. Respondent, however, refused to do so. The amounts paid in satisfaction of the judgments totaled $148,438.80. Annexed hereto marked Exhibit "C" and made a part hereof is a schedule of the amounts paid to the plaintiff seamen by libelant.

Thirty-First: The payment of the judgments as aforesaid was reasonable and prudent and in the best interests of libelant and respondent since it stopped the incurrence of further interest and costs.

Thirty-Second: In addition to the payment of the amount set forth in Article Thirty libelant necessarily incurred and paid legal expenses and disbursements in the total amount of $7,603.75 in defending the actions hereinabove mentioned.

Thirty-Third: By reason of the premises aforesaid and in consequence of the matters heretofore stated herein, libelant has sustained damages in the amount of $156,042.55, no part of which has been paid by respondent to libelant although duly demanded.

Thirty-Fourth: It is the duty of respondent, by reason of the matters aforesaid and pursuant to the terms and conditions of the contract of charter party, heretofore described herein, to indemnify libelant for

its damages in the said amount of $156,042.55 as set forth herein.

Wherefore, libelant prays, that respondent, the United States of America, may be required to appear and answer under oath all and singular the matters aforesaid, that this cause may be heard and determined according to the principles of law and the rules of practice obtaining in like causes between private parties; that this Honorable Court may render a decree in favor of libelant awarding it its damages in the amount of $1,230.65 on the first cause of action alleged herein, and $156,042.55 on the second cause of action alleged herein, with interest and costs, and that libelant may have such other and further relief as may be just and proper.

NELSON, HEALY, BAILLIE & BURKE,
Proctors for Libelant,
52 Wall Street,
New York 5, New York.

(Verification and attachments omitted.)

Appendix C

PROPOSED THIRD PARTY COMPLAINT AND ORDER DENYING LEAVE TO FILE IT IN OSTROM v. WEYERHAEUSER STEAMSHIP CO., W.D. WASH., CIVIL NO. 4255.

EXHIBIT "A"

[Title of Court and Cause.]

THIRD PARTY COMPLAINT

Comes now the defendant and third party plaintiff, Weyerhaeuser Steamship Co., a corporation, and for its third party complaint against the United States of America alleges as follows:

I.

The plaintiff, Reynold E. Ostron, has filed against defendant, Weyerhaeuser Steamship Co., a corporation, a complaint, copy of which is hereto attached as Exhibit "B." The defendant thereafter removed the cause of action to the United States District Court, Western District of Washington, Northern Division, the same being the above-numbered cause.

II.

That the plaintiff's injuries, if any, were solely and wholly caused by the negligent navigation of the United States Government Dredge "Pacific" which collided with defendant's merchant vessel "F. H. Weyerhaeuser."

III.

That the negligent navigation of the United States Government Dredge "Pacific" causing said injuries

to the plaintiff consisted of the following acts and omissions of the officers and crew of the United States Government Dredge "Pacific" occurring immediately prior to the collision:

(A) The Dredge "Pacific" failed to keep a proper or sufficient lookout;

(B) The Dredge "Pacific" was proceeding at an excessive rate of speed in view of fog conditions then prevailing;

(C) The Dredge "Pacific" failed to stop and reverse its engines when it heard the fog signal of defendant's vessel "F. E. Weyerhaeuser";

(D) The Dredge "Pacific" failed to alter its course when it became apparent that a collision between it and the S.S. "F. E. Weyerhaeuser" was imminent and failed to sound the danger signal.

Wherefore, defendant and third party plaintiff demand judgment against third party defendant for full indemnity or contribution for all sums that may be adjudged against defendant Weyerhaeuser Steamship Co., a corporation, in favor of the plaintiff, Reynold E. Ostron, in addition to all sums expended by defendant and third party plaintiff in defending this action.

BOGLE, BOGLE & GATES
EDW. S. FRANKLIN.
Attorneys for Third Party Plaintiff.

United States of America
Western District of Washington
Northern Division—ss.

Edward S. Franklin, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the third party plaintiff above named; that he makes this verification for and on behalf of said third party plaintiff as he is authorized to do; that he has read the foregoing Third Party Complaint, knows the contents thereof and believes the same to be true.

EDW. S. FRANKLIN.

Subscribed and sworn to before me this 27th day of December, 1956.

(Seal) RONALD E. McKINSTRY
Notary Public in and for the State of Washington, residing at Seattle.

[Title of Court and Cause.]

ORDER DENYING MOTION TO BRING IN THIRD PARTY DEFENDANT.

This matter having come on regularly for hearing upon the motion of the Weyerhaeuser Steamship Co., a corporation, for leave to make the United States of America a party to this action, the Weyerhaeuser Steamship Co., defendant, appearing through Bogle, Bogle & Gates and Edward S. Franklin, its attorneys, and the United States of America appearing specially and objecting to the jurisdiction of the court as to the United States of America, and the court having listened to the argument of counsel and having considered the memorandum of authorities filed herein and having examined the pleadings and it appearing to the court that if the defendant and proposed third party plaintiff had sought to institute the cause of action alleged by it in its proposed third party complaint independently in this district against the United States of America, the court would have no jurisdiction over the United States of America and over the objections of the United States of America would be unable to compel the United States of America to submit to the court's jurisdiction; and it appearing further to the court that if it would have no jurisdiction to compel the United States of America to respond to a direct action of the type which the defendant and proposed third party plaintiff attempts to assert here, it likewise is without jurisdiction or power to compel the United States to submit to this court's jurisdiction under the impleador provisions of Rule 14 of the Fed-

eral Rules of Civil Procedure, and the court being fully advised in the premises, now, therefore.

It is hereby ordered that the objections of the United States of America, appearing specially, to this court's jurisdiction are sustained and the action of the Weyerhaeuser Steamship Co., defendant, for leave to make the United States of America a party to this action be, and the same is hereby denied.

Done in open court this 20th day of February, 1957.

JOHN C. BOWEN,
United States District Judge.

Presented and approved by:
WILLIAM A. HELSELL,
Assistant United States Attorney.

Approved as to form.
Notice of presentation waived.
BOGLE, BOGLE & GATES.
BY EDW. S. FRANKLIN,
Attorneys for Defendant
Weyerhaeuser Steamship Co.

Appendix D

THIRD PARTY COMPLAINT, MOTION TO DISMISS THIRD PARTY COMPLAINT AND ORDER OF DISMISSAL IN DURANT v. COASTWISE LINE v. UNITED STATES, S.D. CAL., CIVIL NO. 19,544.

[Title of Court and Cause.]

Third party plaintiff Coastwise Line, a corporation, complains of third party defendant and alleges:

I

Plaintiff Richard C. Durant has filed against Coastwise Line, a corporation, a complaint, copy of which is attached hereto and marked "Exhibit A", and by this reference incorporated herein.

II

That plaintiff Richard C. Durant alleges that on or about February 24, 1955, while aboard the S.S. JAMES LICK, a vessel owned and operated by third party plaintiff, he received a personal injury.

III

That at said time and place third party defendant United States of America was engaged in loading and unloading a portion of said vessel, to wit, No. 2 hold, through the use of certain military forces of the United States at the Port of Whittier, Alaska.

IV

That if at said time and place, as alleged by plaintiff, the said S.S. JAMES LICK was in anywise un-

seaworthy or if the place where plaintiff was working was in an unsafe and dangerous condition, said unseaworthiness and/or unsafe and dangerous condition was caused and created solely by reason of the acts of said third party defendant, its agents, servants and employees.

V

That if plaintiff received any injury while aboard the S.S. JAMES LICK on or about February 24, 1955, as a result of any unseaworthy and/or unsafe and dangerous condition which may entitle him to recover damages against third party plaintiff, then third party defendant, United States of America, is responsible over to third party plaintiff for all such damages and expenses arising therefrom.

WHEREFORE, Coastwise Line, a corporation, demands judgment against third party defendant United States of America, for all sums which may be adjudged in the first instance against defendant and in favor of plaintiff.

Lillick, Geary, McHose, Roethke & Myers,
Gordon K. Wright,
By .....
Attorneys for Defendant and Third Party Plaintiff, Coastwise Line, a corporation.

[Title of Court and Cause.]

MOTION TO DISMISS THIRD PARTY COMPLAINT UNDER RULE 12(d) FEDERAL RULES OF CIVIL PROCEDURE.

NOTICE OF MOTION.

Comes now third party defendant United States of America and moves the Court to dismiss the third party complaint on file herein upon the following grounds:

I.

The Court lacks jurisdiction of third party plaintiff's alleged claim in that the Suits in Admiralty Act, 46 U.S.C. Secs. 741 *et seq.,* does not confer jurisdiction upon this Court in an action at law.

II.

The Court lacks jurisdiction of third party plaintiff's alleged claim in that the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b), 2671 *et seq.,* does not confer jurisdiction upon this Court, plaintiff's alleged claim being exclusively within the jurisdiction of the Suits in Admiralty Act and therefore excepted from the Federal Tort Claims Act by 28 U.S.C. Sec. 2680(d).

III.

The Court lacks jurisdiction of third party plaintiff's alleged claim in that the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b), 2671 *et seq.,* does not confer jurisdiction upon this Court in causes of indemnity or other causes not sounding in Tort.

IV.

Third party plaintiff has failed to allege facts showing that the venue is properly laid in the Southern

V.

The venue of the third party complaint is improperly laid in the Southern District of California in that third party plaintiff does not reside in the Southern District of California and the act complained of did not occur in the said District, as required by 28 U.S.C. Sec. 1402(b).

VI.

The venue of the third party complaint is improperly laid in the Southern District of California in that third party plaintiff does not reside or have its principal place of business in the Southern District of California and the cargo sought to be charged with liability is not found in the said District, as required by 46 U.S.C. Sec. 742.

VII.

The third party complaint fails to state a cause of action against third party defendant, United States of America.

Laughlin E. Waters,
United States Attorney,
Max F. Deutz,
Assistant United States
Attorney,
Keith R. Ferguson,
Special Assistant to the
Attorney General,
Attorneys for Third Party Defendant,
United States of America.

[Title of Court and Cause.]

ORDER GRANTING MOTION TO DISMISS THIRD PARTY COMPLAINT.

The above entitled matter having come on for hearing on January 28, 1957, before the Honorable Leon R. Yankwich, on a motion to dismiss the Third Party Complaint, brought by the Third Party Defendant United States of America, through Laughlin E. Waters, United States Attorney, Keith R. Ferguson, Special Assistant to the Attorney General, by Graydon S. Staring, and Lillick, Geary, McHose, Roethke & Myers appearing by Gordon K. Wright, and the Court having received arguments, both written and oral, and it appearing on the face of the Third Party Complaint that it does not state a claim against the United States of which this Court has jurisdiction, and good cause appearing therefor,

It is hereby ordered, adjudged and decreed that the Third Party Complaint of Coastwise Line, a corporation, against the United States of America, be, and hereby is, dismissed without leave to amend.

Dated this 28th day of January, 1957.

LEON R. YANKWICH,
United States District Judge.

Appendix E

OPINION IN MANGONE v. MOORE-MacCORMACK LINES v. AMERICAN STEVEDORES AND UNITED STATES, E.D. N.Y., CIVIL NO. 15,951.

The defendant, United States of America, moves for an order dismissing the third party complaint as to said defendant, pursuant to Rule 12-b (1) and (2) of the Federal Rules of Civil Procedure.

The question involved is whether the said defendant is properly joined as a third party defendant in a cause of action in admiralty, alleged in the third party complaint where the original complaint pertains to a civil jury claim.

The plaintiff, a longshoreman, in his original complaint against the shipowner, Moore-MacCormack Lines, Inc., alleged causes of action for negligence and unseaworthiness, basing jurisdiction of this court upon diversity of citizenship, 28 U.S.C.A. 1332.

Subsequently, the shipowner obtained leave to serve a third party complaint against the third party defendants, The United States of America, as time charterer of the vessel, S.S. Mormacmoon, and American Stevedores Co., Inc., the plaintiff's employer.

It is alleged in the third party complaint that the shipowner and the Government entered into a contract of time charter party for the transportation of military and government cargoes and that pursuant thereto the Government's agents installed a certain padeye for loading this cargo; that the Government engaged the stevedores to load the cargo; that the wrongful

installation of the padeye by the Government, and the negligent use thereof by the Government and/or the stevedores were the primary cause of the injuries alleged in the complaint in that the vessel was in a seaworthy condition when delivered to the Government or the stevedores pursuant to the time charter, and that the said equipment was so used without the knowledge or consent of the shipowner. It is further alleged that by the terms of the time charter the Government was obligated to the shipowner to perform its work in a proper manner; that under the contract between the Government and the stevedore, the latter was obliged to perform its work thereunder in a proper manner, which obligation inured to the benefit of the shipowner; that the stevedore also undertook with the shipowner itself, while performing its stevedoring work, to do so in a proper manner. Finally, it is alleged that jurisdiction herein is based on either the Suits in Admiralty Act, 46 U.S.C.A. 741 et seq., the Public Vessels Act, 46 U.S.C.A. 781 et seq., or the Federal Tort Claims Act, commonly called the Tucker Act, 28 U.S.C.A. 1346(b), 2671.

It is not alleged that any of the aforesaid agreements or contracts contain any express provisions for indemnity. If that were so, the third party action could be purely a contract action. See *Chicago, B. I. & Pac. R. Co. v. Dobry Flour Mills,* 10 Cir., 211 F. 2d 785; Compare *Chicago, R. I. & Pac. R. Co. v. United States,* 7 Cir., 220 F 2d 939.

The third party complaint, however, is based upon the aforesaid contracts, and thus the cause of action,

in this respect, is for breach of contract, although no specific provision of indemnification is included in the agreement. *Ryan Co. v. Pan-Atlantic Corp.,* 350 U.S. 124, at 133, 134.

Although in this latter respect the action is for tortious breach of contract, nevertheless the action is in contract. *Keifer & Keifer v. Reconstruction Finance Corp.,* 306 U.S. 381; *United States v. Huff,* 5 Cir., 165 F. 2d 720.

Thus, the District Court would have no jurisdiction under the Tucker Act for the said action, in contract, is in excess of $10,000. *Hammond-Knowlton v. United States,* 2 Cir., 121 F. 2d 192, certiorari denied 314 U.S. 694.

The third party complaint also contains allegations upon which a claim for common law indemnity is based. It is often stated that such a claim is based upon implied contract or quasi-contract. However, it has been held that the "implied contract" referred to in the Tucker Act is a contract "implied in fact" and not a contract "implied in law", or quasi-contract. *G. F. Harms Co. v. Erie R. Co.,* 2 Cir., 167 F. 2d 562. *Cf. Ryan v. Pan Atlantic Corp., supra.* It has been held that such actions for common law indemnity are tort claims under the Tucker Act. *Chicago, Rock Island & Pac. R. Co. v. United States, supra,* and cases cited.

On the other hand, whether in contract or tort, this third party action is maintainable in admiralty. A stevedoring contract is maritime, *American Steve-*

dores v. Porello, 330 U.S. 446; a charter agreement is maritime, *Matson Navigation Co. v. United States,* 284 U.S. 352; a common law claim for indemnity is likewise cognizable in admiralty. The No. 34, 2 Cir., 25 F. 2d 602, reversing petition of *L. Boyer's Son Co.,* 23 F. 2d 201, certiorari denied *T. Hogan & Sons, Inc. v. L. Boyer's Sons Co.,* 278 U.S. 606. Cf. *Canale v. American Export Lines,* 17 F.R.D. 269.

Both the Suits in Admiralty Act and the Public Vessels Act are to be construed together. *United States v. Caffey,* 2 Cir., 141 F. 2d 69. They are complementary jurisdictional statutes providing for admiralty suits against the United States. *Aliotti v. United States,* C.A. Cal. 221 F. 2d 598; *Phalen v. United States,* 2 Cir., 32 F. 2d 687; 46 U.S.C.A. 782.

Since the remedy sought by the third party complaint is one that may be maintained under one of these acts, jurisdiction is given under them to the exclusion of the Federal Tort Claims Act. *Prudential Steamship Corp. v. United States,* 2 Cir., 220 F. 2d 655; *Isbrandtsen Company v. United States,* 2 Cir., 233 F. 2d 184; *Johnson v. United States Shipping Board Emergency Fleet Corp.,* 280 U.S. 320; *Simonowycz v. United States,* D.C. Ohio, 125 F. Supp. 847.

Since the admiralty court would have jurisdiction, and since jurisdiction would be excluded on the civil side, the question remains whether the Federal Court can try the civil and admiralty actions together, or more particularly, whether the Court can at the same time sit as a court of law and a court of admiralty.

The decisions of Judge Dimock in *Cornell Steamboat Company v. United States,* S.D.N.Y., 138 F. Supp. 16, and *Dell v. American Export Lines,* S.D. N.Y, 142 F. Supp. 511, are followed rather than those of Judge Murphy in *Skupski v. Western Navigation Corp.,* S.D.N.Y., 113 F. Supp. 726, and Judge Kaufman in *Canale v. American Export Lines, supra.* See also *McKenna v. United States, S.D.N.Y.,* 91 F. Supp. 556.

It has been held that a third party libel under the 56th Rule must be maritime in nature. *Soderburg v. Atlantic Lighterage Corp.,* 2 Cir., 19 F. 2d 286, certiorari denied 275 U.S. 542; *Benedict on Admiralty,* Vol. 2, 6th Ed., Sec. 350. It seems conversely that a third party complaint, under Rule 14 of the Federal Rules of Civil Procedure, should be civil in nature. In fact, Rule 81(a)(1) of the Federal Rules expressly provides that said rules do not apply in admiralty.

While there are some decisions permitting a joinder of jury and non-jury causes, the difficulties encountered therein are minimal by comparison to those in the case at bar. To combine these two jurisdictions together in one litigation seems improper and not feasible.

Under Civil Rule 14 a party may not be impleaded simply because it is or may be liable to the plaintiff, but only, since the 1946 amendment, upon the ground that it is liable to the impleading defendant; under Admiralty Rule 56 a party may be impleaded upon either ground. Cf. *Moore's Federal Practice,* 2nd Ed. Vol. 3, Secs. 14.20, 14.15, 14.16.

Under Civil Rule 14, the Government would not be liable unless the third party defendant satisfied the original judgment. *Canale v. American Export Lines,* S.D.N.Y., 1956 A.N.C. 1350 (not otherwise reported); Thomas v. Naloo Refineries, 10 Cir., 214 F. 2d 884; Clinton v. Roehm, 124 N.Y. Supp. 789, 139 App. Div. 73. Under Admiralty Rule 56 libelant is entitled to recover directly against an impleaded respondent for damages caused by the latter's negligence. When a person or vessel is impleaded under this rule, the case is treated as if the libel had originally been filed against it, and the decree may so provide. The G. L. 40, 2 Cir., 66 F. 2d 764; Staples v. Manhattan Lighterage Corp., E.D.N.Y., 68 F. Supp. 754, affirmed 158 F. 2d 284.

The District Court must also consider whether the claim against the Government is maintained in rem or in personam, both of which are permitted by the Suits in Admiralty Act. Grillea v. United States, 2 Cir., 229 F. 2d 687 and 232 F. 2d 919.

Variations in pretrial procedure and evidence greatly augment the difficulties. A recent decision of the Court of Appeals of this Circuit in Paduono v. Yamashita Kison Kabushiki Zaiaba, 2 Cir., 221 F. 2d 615, demonstrates, quite clearly, the basic and historical differences between the civil and admiralty jurisdictions. To allow the admiralty jurisdiction, which is constitutional, to be so adulterated by civil diversity jurisdiction, which has come under severe criticism, would impair the usefulness of that ancient and historic tribunal. Cf. Lumbermen's Mutual Casualty Co. v. Elbert, 348 U. S. 48.

Finally, the Tucker Act expressly provides that remedies provided for by the Suits in Admiralty Act and the Public Vessels Act shall be excluded thereunder. 28 U.S.C.A. 2680(d).

Waiver of sovereign immunity should be strictly construed. United States v. Sherwood, 312 U. S. 584.

The motion is granted.

Walter Bruchhausen,
U. S. D. J.

Appendix F

[Title of Court and Cause.]

THIRD PARTY COMPLAINT IN HIDICK v. ORION SHIPPING & TRADING COMPANY AND PACIFIC CARGO CARRIERS CORP. v. UNITED STATES, S.D. N.Y., CIVIL NO. 97-365.

THIRD PARTY COMPLAINT OF THE DEFENDANT PACIFIC CARGO CARRIERS CORPORATION.

1. Plaintiff, Massoad Abdaliam Hidick, has filed an amended complaint against the defendants, Orion Shipping & Trading Co., Inc. and Pacific Cargo Carriers Corporation. A copy of said amended complaint is attached hereto and marked Exhibit "X".

2. The defendant and third party plaintiff, Pacific Cargo Carriers Corporation, at all the times hereinafter mentioned, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with an office and place of business at No. 80 Broad Street, in the County, City and State of New York, and was the owner of the S.S. SEACORONET.

3. The third party defendant, the United States of America, a corporate sovereign, was at all times hereinafter mentioned, through its Department of the Navy (Military Sea Transportation Service), the time charterer of the said S.S. SEACORONET, and has by statute permitted itself to be sued in relation thereto.

4. On or about the 22nd day of April, 1952, third party plaintiff and third party defendant entered into a written time charter party (MSTS Contract No.

1102) wherein and whereby third party plaintiff, as Owner, agreed to and did let, and third party defendant, as Charterer, agreed to and did hire the S.S. SEACORONET, upon the terms and conditions set forth in said time charter party and the extensions thereof are attached hereto and marked Exhibit "Y".

5. On or about August 17, 1953, while the aforesaid time charter was in force and effect, the S.S. SEACORONET was, pursuant to directions of the third party defendant, at the port of Pusan, Korea. At said time and place, the third party defendant was, pursuant to the terms of the aforesaid time charter, loading a cargo into the holds of the vessel. As part of the said cargo, gas cylinders said to be empty and free of gas, were being loaded onto the vessel by personnel engaged by and under the supervision and control of the said third party defendant.

6. At about 2300 hours on said date, one of the said gas cylinders loaded aboard the vessel was either defective or was otherwise damaged and was not empty and free of contents, but on the contrary contained harmful and poisonous gas and said gas was permitted by third party defendant, its agents, servants and/or employees, to escape and penetrate various compartments of the vessel, including among others, the crew quarters.

7. The said plaintiff Massoad Abdallan Hidick alleges in his amended complaint herein that while employed aboard the said vessel as a member of the crew and on or about August 17, 1953, he was caused to inhale noxious and poisonous fumes, as heretofore de-

scribed, as a result of which he sustained certain personal injuries. Plaintiff alleges that his injuries were caused by the negligence of the defendants and unseaworthiness of the vessel.

8. Under the terms and conditions of the aforesaid contract of charter party, the third party defendant was required to and did assume all responsibility for the loading and discharging of the S.S. SEACORONET and for the acts or failures to act of the persons engaged by it to accomplish the loading and discharging.

9. Third party plaintiff specifically denies that any negligence on its part or unseaworthiness of the vessel caused or contributed to the plaintiff's alleged injuries. If, however, it be found at the trial of this action that the plaintiff's injuries were cause by some condition for which it can be held liable, then and in that event, the third party plaintiff alleges that such condition resulted from the direct and primary negligence of the third party defendant, its agents, servants and/or employees and the failure of the third party defendant to perform the operation of loading the vessel in a reasonably safe manner which it was obligated to the third party plaintiff to do by the terms and conditions of the said time charter party.

10. By reason of the foregoing, if plaintiff recovers against the third party plaintiff, Pacific Cargo Carriers Corporation, on the ground of negligence in the loading of the S.S. SEACORONET or of unseaworthiness caused thereby, which said third party plaintiff denies occurred or existed, the third party

defendant, United States of America, is liable over to the third party plaintiff in indemnity for the amount of such recovery.

Wherefore, the defendant and third party plaintiff, Pacific Cargo Carriers Corporation, demands judgment against the third party defendant, United States of America, for all sums that may be adjudged against it in favor of the plaintiff, Massoad Abdallan Hidick.

Nelson, Healy, Baillie & Burke,
By Allan A. Baillie,
A Member of the Firm,
Attorneys for Defendant and
Third Party Plaintiff.
52 Wall Street, New York 5, New York.

(Attachments omitted.)